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EXAMINER

AUGHENBAUGH, WALTER

ART UNIT PAPER NUMBER

1772

DATE MAILED: 08/05/2003

12

Please find below and/or attached an Office communication concerning this application or proceeding.

AS-12

<b>Office Action Summary</b>	Application N .	Applicant(s)	
	09/923,621	HAUSMANN ET AL.	
	Examiner	Art Unit	
	Walter B Aughenbaugh	1772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 31 March 2003.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) 9-12 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                             | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____                                    |

**DETAILED ACTION**

***Acknowledgement of Applicant's Amendments***

1. The amendments made in the specification given in Paper 11 filed May 13, 2003 have been received and considered by Examiner.
2. The amendments made in claims 1, 3-5 and 8 given on pages 5-6 of Paper 9 filed March 31, 2003 have been received and considered by Examiner.

***WITHDRAWN REJECTIONS***

3. The 35 U.S.C. 112, first paragraph rejection of claim 2 made of record in paragraph 9 of Paper 7 has been withdrawn due to Applicant's arguments in Paper 9.
  4. The 35 U.S.C. 112, second paragraph rejection of claims 2 and 8 made of record in paragraph 11 of Paper 7 has been withdrawn due to Applicant's arguments in Paper 9.
  5. The 35 U.S.C. 112, second paragraph rejection of claims 3-5 made of record in paragraph 11 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.
  6. The 35 U.S.C. 102(b) rejection of claim 1 as anticipated by Hekal made of record in paragraph 13 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9 and has been replaced with the new 35 U.S.C. 102(b) rejection of claim 1 as anticipated by Hekal made of record in this Office Action (Paper 12).
  7. The 35 U.S.C. 103(a) rejection of claims 2, 4 and 6 over Hekal in view of Yoshikawa et al. made of record in paragraph 15 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.
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8. The 35 U.S.C. 103(a) rejection of claims 3 and 5 over Hekal in view of Kennedy et al. made of record in paragraph 16 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.

9. The 35 U.S.C. 103(a) rejection of claims 3, 5 and 7 over Hekal in view of Yoshikawa et al. and in further view of Kennedy et al. made of record in paragraph 17 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.

10. The 35 U.S.C. 103(a) rejection of claim 4 over Hekal made of record in paragraph 18 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.

11. The 35 U.S.C. 103(a) rejection of claim 8 over Hekal in view of Andersson et al. made of record in paragraph 19 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.

***Election/Restrictions***

12. Applicant's election with traverse of Group I, claims 1-8, in Paper No. 9 is acknowledged. The traversal is on the ground(s) that "examining the two groups together imposes no added burden on the Patent Office". This is not found persuasive because the inventions of Groups I and II are distinct for the reasons given in Paper 7 and have acquired a separate status in the art as shown by their different classification.

The requirement is still deemed proper and is therefore made FINAL.

***NEW REJECTIONS***

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***~~Claim Rejections - 35 USC § 112~~***

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13. Claims 4 and 5 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

There is an inconsistency in the language of claims 4 and 5. Claims 4 and 5 recite "in an amount sufficient to hinder the adsorbent layer's adsorption of amines emanating from... to a level at or below the level of adsorption..." If the level of adsorption of amines of the package with the active ingredients is "at" the level of adsorption of amines of the package without the active ingredients, the adsorbent layer's adsorption of amines is not "hinder[ed]" by the active ingredients. This inconsistency must be corrected in both claims.

***Claim Rejections - 35 USC § 102***

14. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

15. Claims 1 and 4 are rejected under 35 U.S.C. 102(b) as being anticipated by Hekal.

In regard to claim 1, Hekal teaches a package packaging fish (the "fish wrapping"). The recitation "packaging fish or other perishable food items" is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQd 1647 (1987). Hekal teaches a "multilayer structure" having the odor absorbing material taught by Hekal in the form of a film layer that is placed in between two absorbent layers; i.e. a

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multilayer film (page 7, lines 18-28). Hekal teaches that a suitable absorbent material is an elastic (and therefore polymeric) sheet full of cavities or pores (page 7, line 28-page 8, line 5). Furthermore, Hekal states that "an odor absorber in accordance with the present invention for amine-based odors can be applied conveniently in fish wrapping" (page 8, lines 14-16); since the "multilayer structure" (equivalently, the multilayer film) taught by Hekal is "an odor absorber in accordance with the [invention of Hekal]", Hekal teaches that the fish wrapping (equivalently a package) comprises a multilayer polymer film (also see page 8, lines 17-20). Hekal teaches another multilayer structure comprising an elastic sheet and a layer or layers of the odor absorbing material taught by Hekal situated on either side or both sides of the elastic sheet (page 7, line 28-page 8, line 10), and therefore teaches another embodiment of a multilayer plastic film. The package taught by Hekal is a fish wrapping and therefore the multilayer polymer film necessarily covers the packaged fish. Hekal teaches that the multilayer polymer film has at least one adsorbent layer (formed from an odor absorbing material having a polymeric matrix of polyethylene acrylic acid with zeolite bound in the polymeric matrix, page 12, lines 3-5 and lines 24-26) comprising at least one adsorbent polymer (polyethylene acrylic acid). Hekal teaches that the adsorbent layer removes volatile odiferous compounds from a headspace between the multilayer polymer film and the packaged fish inside of the package (page 7, lines 21-28, a package formed from a multilayer polymer film containing fish necessarily comprises a headspace between the multilayer polymer film and the packaged fish inside of the package) wherein the adsorbent polymer consists essentially of a copolymer of ethylene with an  $\alpha,\beta$ -ethylenically unsaturated carboxylic acid having three carbon atoms (polyethylene acrylic acid is

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a copolymer of ethylene and acrylic acid, and acrylic acid is an  $\alpha,\beta$  ethylenically unsaturated carboxylic acid having three carbon atoms).

In regard to claim 4, Hekal teaches that the film additionally contains active ingredients (the plasticizers or additional resins added to the blend taught by Hekal in order to modify the characteristics of the final product such as an improvement in the pliability and softness of the material, see page 6, line 31-page 7, line 5) in an amount sufficient to hinder the adsorption of amines emanating the adsorbent layer to a level at the level of adsorption without the active ingredient added to the film, i.e. the active ingredients taught by Hekal, that are active since they “modify the characteristics of the final product”, are present in an amount that does not change the adsorption of amines of the film since the active ingredients are not taught as affecting the adsorption of amines. Any active ingredient has “amine adsorption properties”; i.e. any active ingredient adsorbs amines or doesn’t adsorb amines, either condition being an “amine adsorption property”. The recitation “from fresh fish or perishable foods contained in package” is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQd 1647 (1987). If an active ingredient does not change the adsorption of amines of a film as compared to the same film except without the active ingredient, the amine adsorption amount “over a 72-hour period” (as claimed) for the film having the active ingredient necessarily is the same as the amine adsorption amount “over a 72-hour period” for the film that does not have the active ingredient.

***Claim Rejections - 35 USC § 103***

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16. Claims 2, 4 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hekal in view of Yoshikawa et al.

Hekal teaches the package comprising a multilayer polymer film as discussed above.

In regard to claim 2, Hekal fails to teach that the copolymer of ethylene and  $\alpha,\beta$ -ethylenically unsaturated carboxylic acid has up to 99% of the carboxylic acid groups neutralized by metal ions. Yoshikawa et al., however, disclose a multilayer film packaging having an outermost or innermost layer made of an ionic copolymer which is produced by completely or partially neutralizing a copolymer of an  $\alpha$ -olefin such as ethylene with an unsaturated organic acid such as acrylic acid or methacrylic acid into a salt with the cation of an alkali metal, zinc or the like (col. 4, lines 30-37). The ionic copolymer serves to confer upon the film heat sealing ability and seal strength in the presence of an oil, among others (col. 4, lines 37-42). Therefore, one of ordinary skill in the art would have recognized to have completely or partially neutralized the carboxylic acid groups in the polyethylene acrylic acid copolymer of Hekal with metal ions such as cations of alkali metals or zinc in order to confer heat sealing ability and seal strength in the presence of an oil to the odor absorbing layer as taught by Yoshikawa et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have completely or partially neutralized the carboxylic acid groups in the polyethylene acrylic acid copolymer of Hekal with metal ions such as cations of alkali metals or zinc in order to confer heat sealing ability and seal strength in the presence of an oil to the odor absorbing layer as taught by Yoshikawa et al.

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Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have controlled the extent of neutralization of the carboxylic acid groups



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in the polyethylene acrylic acid copolymer of Hekal by routine experimentation via variation in the amount of metal cation used in order to determine the optimal extent of neutralization of the carboxylic acid groups in regard to heat sealing ability and seal strength of the odor absorbing film layer depending on the desired end-use result, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art in the absence of unexpected results. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

In regard to claim 4, Hekal teaches that the film additionally contains active ingredients (the plasticizers or additional resins added to the blend taught by Hekal in order to modify the characteristics of the final product such as an improvement in the pliability and softness of the material, see page 6, line 31-page 7, line 5) in an amount sufficient to hinder the adsorption of amines emanating the adsorbent layer to a level at the level of adsorption without the active ingredient added to the film, i.e. the active ingredients taught by Hekal, that are active since they “modify the characteristics of the final product”, are present in an amount that does not change the adsorption of amines of the film since the active ingredients are not taught as affecting the adsorption of amines. Any active ingredient has “amine adsorption properties”; i.e. any active ingredient adsorbs amines or doesn’t adsorb amines, either condition being an “amine adsorption property”. The recitation “from fresh fish or perishable foods contained in package” is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQd 1647 (1987). If an active ingredient does not change the adsorption of amines of a film as compared to the same film except without the active

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ingredient, the amine adsorption amount "over a 72-hour period" (as claimed) for the film having the active ingredient necessarily is the same as the amine adsorption amount "over a 72-hour period" for the film that does not have the active ingredient.

In regard to claim 6, Hekal fails to teach that the copolymer comprises from about 1 to about 50% of acid comonomer by weight based on the weight of the copolymer. Yoshikawa et al., however, teach that the ethylene-acrylic ester copolymers have ethylene contents of not less than 96%, consequently, the acrylic acid content is no more than 4%. Therefore, one of ordinary skill in the art would have recognized to use a polyethylene acrylic acid copolymer with an acid comonomer content of less than 4% by weight as the copolymer of Hekal, since Yoshikawa et al. teach that an acid comonomer content of less than 4% by weight is a suitable acid comonomer content in order to confer heat sealing ability and seal strength in the presence of an oil to the odor absorbing layer as taught by Yoshikawa et al.

17. Claim 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hekal in view of Kennedy et al.

In regard to claim 3, Hekal teaches the package comprising a multilayer polymer film as discussed above. Hekal fails to teach that the multilayer polymer film has a sealant layer, where the sealant layer is in direct contact with the packaged fish or other perishable food item and the adsorbent layer is the sealant layer. The recitation "fish or other perishable food" is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQd 1647 (1987). Kennedy et al., however disclose a

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multilayer film comprising a first outer sealant and food-contact layer which comprises ionomer, ethylene/acid copolymer and/or carboxyl-modified polyethylene (page 35, lines 6-7). Kennedy et al. disclose that the term "ionomer" includes ethylene/acrylic acid copolymer (page 6, line 9). Kennedy et al. further disclose that sealant layers generally are the inside film layer of a package, and that sealant layers frequently serve as a food contact layer in the packaging of foods (page 6, lines 19-22). Therefore, one of ordinary skill in the art would have recognized to use the odor absorbing polyethylene acrylic acid copolymer with zeolite bound in the polymeric matrix of Hekal as a sealant layer which contacts the packaged item since it is notoriously well known to use an ethylene/acid copolymer as a sealant layer which contacts the packaged item as taught by Kennedy et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used the odor absorbing polyethylene acrylic acid copolymer with zeolite bound in the polymeric matrix of Hekal as a sealant layer which contacts the packaged item since it is notoriously well known to use an ethylene/acid copolymer as a sealant layer which contacts the packaged item as taught by Kennedy et al.

In regard to claim 5, Hekal teaches that the film additionally contains active ingredients (the plasticizers or additional resins added to the blend taught by Hekal in order to modify the characteristics of the final product such as an improvement in the pliability and softness of the material, see page 6, line 31-page 7, line 5) in an amount sufficient to hinder the adsorption of amines emanating the adsorbent layer to a level at the level of adsorption without the active ingredient added to the film, i.e. the active ingredients taught by Hekal, that are active since they "modify the characteristics of the final product", are present in an amount that does not change

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the adsorption of amines of the film since the active ingredients are not taught as affecting the adsorption of amines. Any active ingredient has "amine adsorption properties"; i.e. any active ingredient adsorbs amines or doesn't adsorb amines, either condition being an "amine adsorption property". The recitation "from fresh fish or perishable foods contained in package" is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQd 1647 (1987). If an active ingredient does not change the adsorption of amines of a film as compared to the same film except without the active ingredient, the amine adsorption amount "over a 72-hour period" (as claimed) for the film having the active ingredient necessarily is the same as the amine adsorption amount "over a 72-hour period" for the film that does not have the active ingredient.

18. Claim 3, 5 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hekal in view of Yoshikawa et al., and in further view of Kennedy et al.

In regard to claim 3, Hekal and Yoshikawa et al. teach the package comprising a multilayer polymer film as discussed above. Hekal and Yoshikawa et al. fail to teach that the multilayer polymer film has a sealant layer, where the sealant layer is in direct contact with the packaged fish or other perishable food item and the absorbent layer is the sealant layer. The recitation "fish or other perishable food" is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. Kennedy et al., however disclose a

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multilayer film comprising a first outer sealant and food-contact layer which comprises ionomer, ethylene/acid copolymer and/or carboxyl-modified polyethylene (page 35, lines 6-7). Kennedy et al. discloses that the term "ionomer" includes ethylene/acrylic acid copolymer (page 6, line 9). Since the Kennedy et al. further disclose that sealant layers generally are the inside film layer of a package, and that sealant layers frequently serve as a food contact layer in the packaging of foods (page 6, lines 19-22). Therefore, one of ordinary skill in the art would have recognized to use the odor absorbing polyethylene acrylic acid copolymer with zeolite bound in the polymeric matrix of Hekal and Yoshikawa et al. as a sealant layer which contacts the packaged item since it is notoriously well known to use an ethylene/acid copolymer as a sealant layer which contacts the packaged item as taught by Kennedy et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used the odor absorbing polyethylene acrylic acid copolymer with zeolite bound in the polymeric matrix of Hekal and Yoshikawa et al. as a sealant layer which contacts the packaged item since it is notoriously well known to use an ethylene/acid copolymer as a sealant layer which contacts the packaged item as taught by Kennedy et al.

In regard to claim 5, Hekal, Yoshikawa et al. and Kennedy et al. teach the package comprising a multilayer polymer film having an odor absorbing polymeric matrix of polyethylene acrylic acid copolymer with zeolite bound in the polymeric matrix as discussed above. Hekal also teaches that the film additionally contains active ingredients (the plasticizers or additional resins added to the blend taught by Hekal in order to modify the characteristics of the final product such as an improvement in the pliability and softness of the material, see page 6, line 31-page 7, line 5) in an amount sufficient to hinder the adsorption of amines emanating

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the adsorbent layer to a level at the level of adsorption without the active ingredient added to the film, i.e. the active ingredients taught by Hekal, that are active since they “modify the characteristics of the final product”, are present in an amount that does not change the adsorption of amines of the film since the active ingredients are not taught as affecting the adsorption of amines. Any active ingredient has “amine adsorption properties”; i.e. any active ingredient adsorbs amines or doesn’t adsorb amines, either condition being an “amine adsorption property”. The recitation “from fresh fish or perishable foods contained in package” is an intended use recitation that has been given little patentable weight since it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQd 1647 (1987). If an active ingredient does not change the adsorption of amines of a film as compared to the same film except without the active ingredient, the amine adsorption amount “over a 72-hour period” (as claimed) for the film having the active ingredient necessarily is the same as the amine adsorption amount “over a 72-hour period” for the film that does not have the active ingredient.

In regard to claim 7, Hekal, Yoshikawa et al. and Kennedy et al. teach the package comprising a multilayer polymer film as discussed above. Hekal and Kennedy et al. fail to teach that the copolymer comprises from about 2 to about 19% of acid comonomer by weight based on the weight of the copolymer. Yoshikawa et al., however, teach that the ethylene-acrylic ester copolymers have ethylene contents of not less than 96%, consequently, the acrylic acid content is no more than 4%. Therefore, one of ordinary skill in the art would have recognized to use a polyethylene acrylic acid copolymer with an acid comonomer content of less than 4% by weight

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as the copolymer of Hekal, since Yoshikawa et al. teach that an acid comonomer content of less than 4% by weight is a suitable acid comonomer content in order to confer heat sealing ability and seal strength in the presence of an oil to the odor absorbing layer as taught by Yoshikawa et al.

19. Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hekal in view of Andersson et al.

Hekal teaches the package comprising a multilayer polymer film as discussed above. Hekal fails to teach that the package headspace has a modified atmosphere. Andersson et al., however, teaches a food package with tray 10 having prepunched holes 14 through which a modified atmosphere is introduced into the headspace of the package (col. 3, lines 22-27 and lines 46-64 and Figures 1 and 2). A modified atmosphere in the form of an aroma is introduced into the headspace of the package so that the consumer's appetite will be whetted upon opening the package (col. 1, lines 7-16). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have provided a modified atmosphere in the headspace in the package of Hekal, in order to introduce an aroma to the headspace of the package so that the consumer's appetite will be whetted upon opening the package as taught by Andersson et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have provided a modified atmosphere in the headspace in the package of Hekal, in order to introduce an aroma to the headspace of the package so that the consumer's appetite will be whetted upon opening the package as taught by Andersson et al.

***ANSWERS TO APPLICANT'S ARGUMENTS***

20. Applicant's arguments on pages 8-9 of Paper 9 regarding the 35 U.S.C. 102(b) rejection of claim 1 as anticipated by Hekal are rendered moot due to the new 35 U.S.C. 102(b) rejection of claim 1 as anticipated by Hekal provided in this Office Action (Paper 12).

In response to Applicant's argument that "Hekal does not teach a package containing food", Hekal plainly teaches a package containing food as made clear in the new 35 U.S.C. 102(b) rejection of claim 1. The construction of the sentence on page 8, lines 14-17 of Hekal does not limit the use of the fish wrapping for waste; the "covering" is limited to waste, but not the fish wrapping.

In response to Applicant's argument that "Hekal does not teach a package comprising a multilayer polymer film", Hekal plainly teaches a package comprising a multilayer polymer film as made clear in the new 35 U.S.C. 102(b) rejection of claim 1.

In response to Applicant's argument that the "multilayer structure" taught by Hekal is not a "multilayer polymer film", the "multilayer structure" taught by Hekal is structurally equivalent to a "multilayer polymer film" as claimed by Applicant as discussed in the new 35 U.S.C. 102(b) rejection of claim 1. Applicant mentions that the "absorbent layer" is "taught to be a fabric"; however, Applicant does not mention that an elastic sheet is also taught as a suitable absorbent material as discussed in the new 35 U.S.C. 102(b) rejection of claim 1. Also note that many fabrics are polymeric.

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In response to Applicant's argument in the first three lines of page 9 of Paper 12, the 35 U.S.C. 102(b) rejection of claim 1 made of record in Paper 7 makes it clear that the polyethylene acrylic acid taught by Hekal is an adsorbent polymer that consists essentially of a copolymer of



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ethylene with an  $\alpha,\beta$  ethylenically unsaturated carboxylic acid having three carbon atoms. Hekal does indeed "pertain[] to zeolite and its ability to adsorb amines" as Applicant points out, but the fact that the polyethylene acrylic acid contains zeolite makes the blend of polyethylene acrylic acid and zeolite an adsorbent polymer. In response to Applicant's argument that Hekal does not teach that the polyethylene acrylic acid itself is adsorbent, the limitation on which the Applicant relies is not stated in the claims. It is the claims that define the claimed invention, and it is the claims, not specifications that are anticipated or unpatentable. *Constant v. Advanced Micro-Devices Inc.*, 7 USPQ2d 1064.

21. Applicant's arguments on pages 9-11 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claims 2 and 6 over Hekal in view of Yoshikawa et al. have been fully considered but are not deemed to be persuasive.

Hekal does not teach away from the use of a copolymer of ethylene with an  $\alpha,\beta$  ethylenically unsaturated carboxylic acid having 3-8 carbon atoms, contrary to Applicant's argument, because the polyethylene acrylic acid is an adsorbent polymer by virtue of the fact that zeolite is blended with the polyethylene acrylic acid. Claim 1 recites that the "at least one adsorbent layer compris[es] at least one adsorbent polymer" where the "adsorbent polymer consists essentially of a copolymer of ethylene with an  $\alpha,\beta$  ethylenically unsaturated carboxylic acid having from 3-8 carbon atoms", i.e. the adsorbent layer may contain other constituents besides the polymer, such as the zeolite of Hekal.

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In response to Applicant's argument in the second full paragraph of page 10 of Paper 9 that there is no suggestion to combine the references, the Examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art

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would be motivated to make the proposed combination of primary and secondary references. *In re Nomiya*, 184 USPQ 607 (CCPA 1975). However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. *In re McLaughlin*, 170 USPQ 209 (CCPA 1971). References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures. *In re Bozek*, 163 USPQ 545 (CCPA 1969). One of ordinary skill in the art would have been motivated to consult Yoshikawa et al. to modify Hekal because Yoshikawa et al. discusses the use of copolymers such as polyethylene acrylic acid as a sealant material for multilayer packaging applications as made of record in the art rejections involving Yoshikawa et al. in Paper 7 and in this Office Action (Paper 9). In response to Applicant's argument that "Ability to confer heat sealability and seal strength would not motivate one skilled in the art wanting to find an amine adsorbent to use an ionomer", the fact that Applicant uses the metal salt for a different purpose does not alter the conclusion that its use in a prior art device would be *prima facie* obviousness from the purpose disclosed in the reference. *In re Lintner*, 173 USPQ 560. In response to Applicant's argument that "all the limitations of claim 2 still would not be met", all the limitations of current claim 2 have been met by the 35 U.S.C. 103(a) rejection of claim 2 over Hekal in view of Yoshikawa et al. provided in this Office Action (Paper 9). Hekal does not teach away from the use of an ethylene copolymer, contrary to Applicant's argument, because the polyethylene acrylic acid taught by Hekal is an absorbent polymer by virtue of the fact that zeolite is blended with the polyethylene acrylic acid.

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Applicant's rhetorical question "Why not choose one of the other polymers taught in H[e]k[a]l?" is irrelevant because Hekal teaches polyethylene acrylic acid, which is a copolymer of ethylene

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with an  $\alpha,\beta$  ethylenically unsaturated carboxylic acid having three carbon atoms as claimed by Applicant. Applicant then argues "one would still be left without any suggestion of an ionomer of a copolymer of..." The claims of the instant Application do not recite an ionomer.

In regard to claim 6, Applicant argues that "there is no suggestion that any level of acid comonomer has any level of amine scavenging effect, so optimization through routine experimentation cannot possibly be a basis for rejection"; Examiner has not included this basis for rejection in the rejection of claim 6 provided in this Office Action (Paper 12).

22. Applicant's arguments on page 10 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claim 4 over Hekal in view of Yoshikawa et al. are rendered moot due to the new 35 U.S.C. 102(b) rejection of claim 4 as anticipated by Hekal made of record in this Office Action (Paper 12).

23. Applicant's arguments on page 11 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claim 3 over Hekal in view of Kennedy et al. have been fully considered but are not deemed to be persuasive.

Applicant's arguments regarding this rejection have been addressed above.

24. Applicant's arguments on page 11 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claim 5 over Hekal in view of Kennedy et al. are rendered moot due to the new 35 U.S.C. 102(b) rejection of claim 5 as anticipated by Hekal made of record in this Office Action (Paper 12).

25. Applicant's arguments on page 12 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of ~~claims 3 and 7~~ over Hekal in view of Yoshikawa et al. and in further view of Kennedy et al. have been fully considered but are not deemed to be persuasive.

Applicant's arguments regarding this rejection have been addressed above.

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26. Applicant's arguments on page 12 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claim 5 over Hekal in view of Yoshikawa et al. and in further view of Kennedy et al. are rendered moot due to the new 35 U.S.C. 102(b) rejection of claim 5 as anticipated by Hekal made of record in this Office Action (Paper 12).

27. Applicant's arguments on pages 12-13 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claim 4 over Hekal are rendered moot due to the new 35 U.S.C. 102(b) rejection of claim 4 as anticipated by Hekal made of record in this Office Action (Paper 12).

28. Applicant's arguments on page 13 of Paper 9 regarding the 35 U.S.C. 103(a) rejection of claim 8 over Hekal in view of Andersson et al. have been fully considered but are not deemed to be persuasive.

Applicant argues that since Hekal "does not teach a package for food, it is unlikely that one skilled in the art would even consider modifying any 'headspace' between the [film of Hekal] and the wrapped fish". Contrary to Applicant's argument, Hekal teaches a package for food as discussed above. Applicant's remaining arguments regarding this rejection have been addressed above.

### *Conclusion*

29. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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~~A shortened statutory period for reply to this final action is set to expire THREE~~  
MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

30. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Walter B. Aughenbaugh whose telephone number is 703-305-4511. The examiner can normally be reached on Monday-Thursday from 9:00am to 6:00pm and on alternate Fridays from 9:00am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on 703-308-4251. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

wba  
07/31/03 WBA

  
NASSER AHMAD  
PRIMARY EXAMINER  
Acting SPE